Supplement No. 1 to the Review, containing matter in continuation of para. 21 at p. 168*n*. This supplement contains paragraphs numbered 22 to 30.

(EXTRA APP. PARAGRAPH 22.)

22. No discussion of what is Suheeh, Batil or Fasid would have even the semblance of completeness unless it were accompanied by some notice of the difference between Hookm or command and Shoobha-i-Hookm or doubt of command. As stated above in paragraph 12, in discussing III°, it will be observed that in order that a command should come into existence it is necessary, in addition to what is required in I°, II° and IV°, that the conditions on which the existence of a command rests should be fulfilled, *e.g.*, Nikah, which in addition to the other three conditions, relating to Ahleut, Mahalleeut and Illut, requires that the condition or Shurt for the command coming into existence should also be found; this condition is the presence of witnesses: so that if the witnesses are not present at the Nikah, the command from God relating to the validity of the Nikah does not arise, notwithstanding the compliance of the other requisites. This principle that the command or Hookm does not come into existence when it is unaccompanied by the conditions necessary therefor, is subject to another principle, *viz.*, the principle of Shoobha-i-Hookm or doubt of command; and this latter principle is based on the following reason, *viz.*, that the presence of Ahal and Mahal and Illut leads *prima facie* to the conclusion that the command or Hookm must have emanated from God and come into existence, because when the condition as regards Mahal is fulfilled, then it seems proper that the absence of other matters should not lead to a nullity. But at the same time there is an equally plausible argument the other way, *viz.*, that the absence of the Shurt or condition necessary for the existence of Hookm or command leads to the inference that the command is absent. Thus there are two conflicting principles operating at one and the same time in opposite ways. One principle is that the presence of Mahal leads to the inference that the command is present, but the absence of the condition relating to the existence of the command leads to the inference that the command is absent. Thus, there arises a Shoobha or doubt as to whether the command or Hookm, in such a case, is found or not found, that is to say, whether such command has emanated from God or not. If the condition of the existence of the command along with the other

three matters had been found, then the Hookm or command would have been that the particular act or transaction was Saheeh or valid. If the Mahal had been absent, and the other three requirements had been present, then the act would have been Batil or absolutely void. But in a case where the Mahal is present, that is, when the Mahal is good and unobjectionable, but the condition for the Hookm or command is wanting, there the act or transaction is neither Saheeh or valid nor Batil or void, but Fasid or defective or invalid. It is for this reason, that in a case of Nikah, where there are no witnesses to it, the command or Hookm affirming the validity of the Nikah is absent; but the Mahal being fit and the form of Nikah having been gone into apparently there is Shoobha or doubt of Mahal and, therefore, some of the consequences of a valid marriage, such as the establishment of Nasab and so forth are attached to such marriage. This subject is dealt with in Mira, p. 295 and 347, in Kashf-i-bazdavi, Vol. I, p. 259, in the chapter on Nahee and in Azmery, Vol. 2, p. 412, etc. The first-named author says, "And for this reason there is no Shoobha or doubt of Nikah in the case of maharim or those women who are prohibited to marry; and there is no doubt or Shoobha in the case of a sale of Hoor or freemen, because the meaning of Shoobha or doubt is the establishment of Daleel or reason (in favour of the command or Hookm); whilst at the same time the Madlool (or that which is proved by the Daleel or reason, that is to say, the command) is absent on account of (a Mánai or) preventive circumstance. Therefore the Shoobha or doubt is negatived in a case in which the Mahal is absent." At page 348 of the Mira, the divisions of Shoobha are given, but it is not necessary here to pursue the matter further. The same subject is treated in Kashf-i-bazdavi, Vol. 4, p. 342. See also Mahomed Yusoof's Tagore Lectures, Vol. 3, Appendix p.

A:—I must state that it is mainly the result of my study of the Principles of Jurisprudence, that has enabled me to identify the idea of a Fasid transaction with one susceptible of the Principle of Shoobha-i-Hookm. But though I submit my inference, with humility and due modesty, still I do the same without diffidence on the point. The subject of the Mahomedan Jurisprudence is one beset with manifold difficulties and one of those difficulties consists in the way in which language is used to convey mental ideas by the Arabian writers in the original. The method adopted by them is to go on stating results and conclusions, one after the other, without assigning any reason, so that it often happens that the reason of a thing is given at one place and the conclusion is given at a very distant place, and there is a large space intervening between the two and the language used

is such as is not generally calculated to lead to elucidation and identification.

B:—In the case of a marriage without witnesses, although such a marriage should result in Fasad, that is invalidity or defect, according to the application of the rule of the Shoobha-i-Hookm, still the practical result of such a marriage is tantamount to nullity or Batil, because although absence of Sihut or validity might lead either to *Batil* or void and Fasid or defective and invalid, still the practical result in each particular case will depend on that particular case; if that case is susceptible of an intermediate and inferior degree of unlawfulness such as is implied in the term Fasid or defective, then certainly absolute nullity may not be predicated with regard to it, such as a defective sale: sale is a transaction in which there could be an intermediate degree of unlawfulness, *e.g.*, where the sale does not conform to the conditions requiring the existence of commands there the Mahomedan Jurists have recognised an intermediate state, *viz.*, a state where the sale is not absolutely void or a nullity owing to the fitness of the Mahal, but, at the same time, it does not involve the first class of perfection of essence, owing to absence of the conditions of the Hookm or command: also the intermediate state is that of defect or invalidity, so that the sale has a legal existence, but with some defect, which is capable of being cured when the purchaser obtains possession. But, so far as marriage is concerned, it is different from sale, because there is no intermediate state of lawfulness; it is either lawful or Sahih by which connexion between spouses is legalized, or it is unlawful and amounts to a nullity by reason of which connexion is not lawful.

C:—The state of the law in the above-mentioned case, *viz.*, that of a marriage without witnesses and the admitted effects thereof, *viz.*, first (1) there must be separation between the parties: secondly (2), establishment of *Nasab* and *Iddut*, has enabled me to put two and two together and has led me to the conclusion that the cause of separation is the effect of the nullity of the marriage owing to its participation of the character of what is *Batil* or void; and the establishment of Nasab and *Iddut* arises from the Mahal being a fit one. I have thus been enabled to observe identity and a common point between Fasid and Shoobha-i-Hookm; and a passage in the Kashf-i-bazdawi, Vol. IV, p. 282, in the margin confirms my view.

D:—Is there any intermediate state of Fasad or defect in a case of waqf, in other words, is it possible to imagine a case of waqf which does not involve the first class of excellence, *viz.*, that of being absolutely and perfectly valid or saheeh, and also does not

involve the worst class of defect, *viz.*, that of being a nullity and being absolutely void but still involves the excellence and defect in its intermediate state. I have not yet come across any text bearing directly upon this question, and it is too early for me to hazard a conjecture. It is not for me to make *Ijtahad*, as it is understood in the Muhammadan law; but I may state that junction of excellence and badness in one and the same subject is possible, provided that there are two distinct points of view. In the case of a Fasid sale the excellence could co-exist with the badness, and therefore it is possible to imagine a sale neither absolutely good nor absolutely bad, but being in the intermediate stage, that is to say a stage in which the excellence is accompanied with defect, which defect is capable of being removed to a certain extent. But this state is not possible in the case of a defective *Nekah*, in which the defect is not capable of being removed by any such measure as that by which a defect in a sale is removed. Therefore in the case of *Nekah*, there is either unalloyed excellence or unalloyed badness. But there is still a third case in which excellence has its independent and continued existence, and badness also has, at the same time, its independent and continued existence; therefore both excellence and badness co-exist, and the result is that the excellence brings its own reward and the badness brings its own punishment.

E:—I have come across texts showing that a waqf may be Mouqoof, as in the case of one making a waqf of another man's property by a process similar to that by which a Fazuli sells another man's property. The waqf or the sale in the case aforesaid depends upon the permission of the owner. But I have not come across a case in which a waqf is neither absolutely good nor absolutely bad, but is only partially good and partially bad. The matter requires fuller consideration.

23. As the main principles of the Muhammedan Jurisprudence governing all the transactions as a whole have, for their basis, uniformity in principle and character, so that each transaction has some similarity with the others, it would be useful to state shortly the different classes of sale, and the Muhammadan idea of property.

24. As regards the classification of sale, there are different points of view from which a sale can be classified. Ruddool Moohtar, Vol. 4, p. 1, refers to classification from four points of view.

I. Sale from the point of view that it is Hadis, or means for creation of right, is divided into four classes:—

(1) Nafiz or effective when it at present leads to the Hookm or result of sale (and that is transfer of ownership and the vesting of the property in the purchaser).

(2) Moukoof or dependant, when the sale leads to the result on the permission of the real owner (where property was sold by the Fuzoolee).

(3) Fasid or defective and invalid, when the sale leads to the result on the purchaser obtaining possession of the property sold.

(4) Batil, where the sale leads to no result whatever.

II. The second division of sale is from the point of view of its connection with the property sold (that is to say, the second division of sale arises from its subject-matter); and this division has four classes:—

(1) Where Ain or essence is opposed to Ain or essence, and this is called Mookaiza, *e.g.*, to sell cloth for book.

(2) Where Sumun or a coin or cash is opposed to Sumun or coin or cash, and this is called Surf sale; that is to say, the Mabee or property sold is cash or Nukd.

(3) Where the Sumun, that is, Nukd or cash, is sold for Ain or essence; and this is called a Sulum sale.

(4) Where Ain or essence is sold for Sumun, and this is called Baimootluk or sale as generally understood, for it has no special name assigned to it.

III. The third division of sale is from the point of view of its connection with Sumun or consideration or the amount thereof. From this point of view sale is divided into four classes:—

(1) Moorabiha, where the sale is at a profit,

(2) Towlea, where the sale is without profit,

(3) Wazeea, where the sale is at a loss,

(4) Moosawee, where the sale is without profit and without loss.

IV. The fourth division is where the sale is classified with reference to its connection with the Wusf or quality of Sumun or consideration, in this way that the consideration is either payable at once or payable in future.

25. Sale is also classified as Jaiz and Ghair Jaiz; the former means Nafiz or effective: Ghair Jaiz is subdivided into Batil, Fasid and Moukoof.

26. Sale is also classified into Saheeh and Fasid: and the former is divided into Lazim and Ghair Lazim. It is also divided into Saheeh, Batil, Fasid and Moukoof.

27. Sales in which a Nuhee or negative command is to be found are divided into Batil, Fasid and Moukoof: that is to say, these are sales in which a Nuhee or prohibitive command is to be found in the

Shera. Sales in which no Nuhee or negative command is to be found, in the Shera are :—

(1) Nafiz, Lazim, Bila Khyar, that is, a sale which takes effect at once and which conforms to the Shera in its essence or Asul, in which no right of third party appertains and in which there is no option.

(2) Nafiz, Ghair Lazim, Bil Khyar, that is, a sale which takes effect at once and which conforms to the Shera in its essence, in which no right of third party appertains *but in which there is option.*

(3) Moukoof in which another's right is connected.

28. It will thus be seen that it is a matter of some little difficulty and embarrassment to find out the meaning of a particular author when he uses the following terms in reference to a transaction whatever be its nature:—Jaiz or Ghair Jaiz; Suheeh or Ghair Suheeh; Fasid or Batil. In regard to the last term, it is to be noted that a transaction is divided into Suheeh and Fasid, that is, Ghair Suheeh, and the latter is said to consist of Batil and Fasid (or defective) proper.

29. As regards the idea of property amongst the Mohamedans, it would require much more time and space to discuss the subject fully than I have at present at my disposal. I have extracted texts on the subject which are printed in the supplement for ready reference. It is sufficient to state that the term used in the Fikah for property is Mal. Mal is that towards which the mind of man becomes mail or inclined, and with reference to which the feeling of avarice and temptation, is capable of being entertained by human beings. It is necessary for a thing to be Mal, that it should be capable of being stored and kept for future use. Thus mere Moonafa or benefit is not property such as the right to reside in a house by means of a lease or Ijara. In this sense wine is property. But so far as Moslems are concerned, another condition must be complied with before a thing could become property for them, and that condition is that the thing must be such that a Moslem is not prohibited to use the same by touching it or making any other use of it; in other words, the thing should be such that a Nuhee or negative command, making it Kubeeh lai-ainhee or bad in its essence, should not have been found in the texts in reference to that thing. This idea is denoted by the expression Mal-i-Mootkuwwim or property having value.

30. The next subject that requires passing notice is the meaning of the expression of Taamuloon Nass or custom and practice. It has been given by some authors a meaning most mischievous to Mohammedan Law: it is sometimes said to mean business transaction and

sometimes to mean custom and practice: the latter is a near approach to the real meaning in one sense; but in another sense it is widely different from the real meaning. The real meaning of Taamuloon Nas will be gathered from the following principle. There are only four sources of the Mohamedan Law, *viz.*, the Koran, the Hudees, the Ijma and the Kyas. Custom is not a source of law independently of itself: but if custom is based on Ijma, then and then only is it legal not only for the particular place where the custom prevails but for the whole of the Mohammedan world. But if there is no Ijma to support custom (Taaroof or Adut) then the custom is not binding as law. The common sense of the principle is this: it is necessary for Ijma to be valid that it should be the concensus of Moojtahids or the Doctors in Law, leaving aside for the present other conditions by which the validity of Ijma is surrounded. Therefore the practice of illiterate people who have no real knowledge of law, and of tradesmen and the like is not a justification in law for legalising a particular course of action or for affording a precedent. The texts bearing on Taamul-on-Nissa are also collected in the supplement, and it is not necessary to say more on the subject at present.